

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP2800-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF475

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD D. DEHATE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Brennan, JJ.

¶1 PER CURIAM. Gerald Dehate appeals a judgment convicting him of repeated sexual assault of a child and incest with his stepdaughter. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of counsel. He contends his counsel was ineffective for failing to impeach the victim's mother with evidence that she had been convicted

of three crimes and for failing to make any argument at the sentencing hearing. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The eleven-year-old victim testified at trial and vouched for the accuracy of allegations she made in a recorded interview. The video recording was played for the jury. The victim described Dehate's repeated sexual assaults at four different addresses where the family lived from the time she was six years old until she reported the assaults. She said Dehate tried to put his penis in her butt. He also tried to put a silver toy in her butt, and she drew a picture of a vibrator similar to one recovered from Dehate's trailer. She described seeing "white stuff" come out of Dehate's penis and described condoms as green balloons that came in little square packages. She said that Dehate wanted her to "go up and down" on his penis. She first told her brother Dehate was abusing her. Her brother told her mother.

¶3 Two of Dehate's biological daughters also testified that Dehate sexually abused them when they were approximately the same age as the victim. The victim's brother confirmed that she first told him about the abuse and he told their mother.

¶4 The victim's mother confirmed the various addresses where the family lived and described her role in contacting the police after the victim's brother, and later the victim, informed her of the abuse. She also located the vibrator and condoms in Dehate's trailer and turned them over to the police. On cross-examination, the defense implied that the victim's mother encouraged the victim to make false allegations in order to gain some advantage in the parties' divorce proceedings. The mother confirmed she had filed for divorce and wanted

to get Dehate out of the house at the time the assaults were reported. She admitted the vibrator and two pornographic movies belonged to her as well as Dehate. She also admitted that Dehate told her about his biological daughters' allegations of sexual abuse, but she did not believe them at that time.

¶5 Dehate testified, denying any sexual contact with the victim or his daughters. He admitted being convicted of five crimes. The jury found Dehate guilty of both offenses.

¶6 At the sentencing hearing, Dehate declined to exercise his right of allocution and his attorney said, "I don't have any argument." The court imposed concurrent sentences totaling sixteen years' initial confinement and nine years' extended supervision.

DISCUSSION

¶7 A defendant claiming ineffective assistance of counsel must establish deficient performance and prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). If the defendant makes an insufficient showing of one of these components, the court does not need to address the other component. *Id.* at 697. To establish prejudice, the defendant must show a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one that undermines our confidence in the outcome. *Id.*

¶8 Dehate has not established prejudice from his counsel's failure to impeach the victim's mother's testimony by asking her about her prior convictions. The mother's testimony was not critical to the State's case. She merely explained her role in contacting the police, corroborated the various

addresses where the family lived and described her role in locating the vibrator and condoms and turning them over to the police. Impeaching her credibility would not have substantially damaged the State's case. The State's case was based primarily on the victim's detailed testimony and Dehate's biological children's description of their sexual abuse.

¶9 The defense adequately presented its theory that the victim's mother encouraged the victim to make a false allegation and impugned her character by showing that a contempt proceeding was brought against her in the divorce case as well as having her admit to joint ownership of the vibrator and pornography. The marginal value of establishing her criminal convictions would not be likely to cause the jury to have a reasonable doubt about the victim's allegations.

¶10 Dehate also failed to establish prejudice from his attorney's decision to make no argument at the sentencing hearing. At the postconviction hearing, the attorney explained that Dehate was not cooperative with an alternative presentence investigation report (PSI) and counsel did not want to "make things up." Dehate does not identify any facts his counsel could have relayed that were not contained in the PSI. Dehate specifically notes his care for a sick uncle and his problem with alcohol. He contends his attorney should have "highlighted" that information. That information was contained in the PSI and it is not reasonably probable that Dehate's sentence would have been decreased if his counsel had highlighted these factors. Because Dehate does not identify any mitigating factors that the sentencing court was unaware of, our confidence in the outcome is not undermined by his counsel's failure to make an argument at the sentencing hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

